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In the

Supreme Court of the United States

OCTOBER TERM, 1981

No. ___

John S. Ferguson, *Petitioner*

V.

Union Mutual Stock Life
Insurance Company of American, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June 25, 1982

QUESTION PRESENTED

Whether the incontestability clause contained in a disability insurance policy as required by California statute can be circumvented by allowing a defendant insurance carrier to plead a defense disallowed by the incontestability clause based upon a doctrine of estoppel.

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The petitioner John S. Ferguson, M.D. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding March 29, 1982.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion in the United States District Court for the Eastern District of Arkansas, Western Division denying plaintiff's motion for summary judgment is published at 501 F. Supp. 247 (E.D. Ark. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 29, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the incontestability clause contained in a disability insurance policy as required by California statute can be circumvented by allowing a defendant insurance carrier to plead a defense disallowed by the incontestability clause based upon a doctrine of estoppel.

STATUTORY PROVISIONS INVOLVED

California Insurance Code §1035.2 (1972):

§10350.2 Incontestable Clauses.

A disability policy shall contain a provision which shall be in one of the two forms set forth herein. Policies other than noncancellable policies shall use Form A. Noncancellable policies shall use either Form A or Form B. In Form B the clause in parentheses in paragraph (a) may be omitted at the insurer's option. Paragraph (a) in Form A shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during the initial three-year period, nor to limit the application of Sections 10369.2 to 10369.6, inclusive, in the event misstatement with respect to age or occupation or other insurance.

Form A.

Time Limit on Certain Defenses: (a) After three years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such three-year period.

(b) No claim for loss incurred or disability (as defined in the policy) commencing after three years from the date of issue of this policy shall be reduced or denied on the ground

that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

Form B.

Incontestable: (a) After this policy has been in force for a period of three years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.

(b) No claim for loss incurred or disability (as defined in the policy) commencing after three years from the date of issue of this physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

STATEMENT OF THE CASE

The present case was an action brought by Dr. John S. Ferguson, a resident of Arkansas and/or California against Unionmutual Stock Life Insurance Company, a Maine corporation. The Complaint was first filed in the Circuit Court of Pulaski County, Arkansas and was removed to the Federal District Court of the Eastern District of Arkansas after Petition for such removal was filed by the Defendant, Unionmutual. The jurisdiction of the Federal Court was invoked on the basis of diversity of citizenship between the parties in an action in which the amount of controversy exceeded $10,000.00.

The suit was brought in April, 1978 by Dr. John S. Ferguson against Unionmutual to recover disability benefits Dr. Ferguson contends are due him under the provisions of three (3) disability policies issued to him by Unionmutual. The three policies were issued to Dr. Ferguson on January 8, 1975, March 7, 1975 and April 3, 1975. The total amount of benefits provided by the three policies was $3,500.00 a month for the lifetime of the insured in the event a disability within the definition of the policy occurred to the insured. The first policy issued on January 8, 1975 provided $2000.00 in monthly benefits, the policy issued March 7, 1975 provided for $500.00 in monthly benefits, and the third policy issued on April 3, 1975 provided for $1,000.00 in monthly disability benefits if the contingent events under the policy occurred to the insured, Dr. Ferguson.

One application was submitted by Dr. Ferguson for the policy issued in January of 1975 and another single application was submitted by Dr. Ferguson for both of the other policies. The applications were actually filled out by Larry Davis, an independent insurance agent in California, who sold policies for Unionmutual as well as other companies. Dr. Ferguson was a practicing dermatologist in Los Angeles area and also had farming interests in

Arkansas at the time these contracts were entered into between Dr. Ferguson and Unionmutual. All of these insurance policies were made in California and delivered to Dr. Ferguson in California.

One question on the applications asked for disclosure of other insurance in force and provided 3 blanks for the applicant to fill in. Dr. Ferguson's application listed three disability policies that he had in force at that time with Massachusetts Indemnity totaling $1500.00 in benefits. On the second application signed March 7, 1975, a block was checked that said $500.00 of the Massachusetts Indemnity coverage would be dropped if a $500.00 policy on Unionmutual was issued. Under "Special Requests" a request was made for an additional $1000.00 policy to be issued and if issued the applicant would agree to drop the $1000.00 policy with Massachusetts Indemnity by May 1, 1975. The policies were approved and issued by Unionmutual before the May 1, 1975 date. Dr. Ferguson's secretary continued to pay the premiums as they became due on the Massachusetts Indemnity policies and the policies were never dropped. No action was taken by Dr. Ferguson, the agent who sold the policies, or Unionmutual to insure that the policies were dropped.

On July 2, 1976, Dr. Ferguson fell exiting an American Airlines Jet in Little Rock and was immediately hospitalized. His injuries suffered on that date left Dr. Ferguson permanently and totally disabled and he has remained unable to practice medicine since that time.

Dr. Ferguson through an insurance agent, Dave Carver, with assistance from Mrs. Ferguson filed claims on other policies that Dr. Ferguson had in force within a few weeks of the injury. Dr. Ferguson had several policies that were not listed on the application to Unionmutual. Some policies were strictly business overhead policies, some overhead with other disability benefits, and he also discovered that he was a member of two group insurance

plans that would pay him disability benefits. Dr. Ferguson sent a notice of claim to Unionmutual which was received just six days after his injury. On August 9, 1976 a claim form was sent Dr. Ferguson by Unionmutual. The claim form was returned promptly incomplete and there was a note attached, later discovered to be in the handwriting of Dave Carver stating that a claim would not be submitted at that time. In October, 1977 a completed claim form was submitted by the Plaintiff to Unionmutual. An exchange of correspondence followed with Unionmutual asking for more information, although never stating in any manner that the claim would be denied. The suit was filed on April 8, 1976.

Each of these policies contained an incontestability clause which is required by California statutory law. The pertinent part of such clause states:

> "Incontestable (a) After this policy has been in force for a period of two years during the lifetime of the insured it shall become incontestable as to the statements contained in the application." California law required only a three year incontestability period, but Unionmutual made their clause more restrictive by having a two year incontestable clause.

Unionmutual never contested any statement made in the application of John Ferguson until it filed its Answer and Counter-Claim to the lawsuit in July, 1978, over 3 years from the issuance of each of the policies. The only defenses raised by Unionmutual were defenses concerning statements made in the application by Dr. Ferguson.

Federal District Judge Henry Woods ruled in a memorandum opinion filed November 12, 1980 denying Appellant's Motion for a Summary Judgment, that the Appellant could not assert the incontestable clause to avoid defenses based on statements made in the application. Judge Woods relied on the same opinion to later deny a Motion in Limine and a renewal of the Motion for Summary Judgment by the Plaintiff. The Interrogatories submitted

to the jury were at the trial all related to statements made in the application and the judgment entered by the Court rescinding the policy was based on a finding by the jury that misrepresentations had been made in the application. From the judgment of the District Court an appeal was taken to the United States Court of Appeals for the Eighth Circuit which affirmed the lower court's decision.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF AN INCONTESTABILITY CLAUSE REQUIRED BY STATE LAW.

As was stated in *U.S. v. Patryas*, 90 F.2d 715 (7th Cir. 1937) the Court cannot interpret an incontestability clause in such a manner as to create an exception not clearly provided for in the policy. It has been held that an insurer may add exceptions to an incontestability clause. *Southern U.L.Ins. Co. v. White*, 188 S.W. 266 (1916). But where the statute or policy does not except any form of fraud in the application, such a defense may not be raised by the insurer after the time of the contestable period has passed. *Policyholder's National Life Insurance Co. v. Harding*, (8th Cir. 1945) 147 F.2d 851, *Dibble v. Reliance Life Insurance Company*, 170 Cal. 199, 149 P. 171 (1915). It may have been possible for Unionmutual to provide exceptions in its incontestability clause that might have allowed it to raise these defenses in the instant fact situation. However, the fact is that there were no exceptions provided for in the incontestability clause in Dr. Ferguson's policies and the exceptions permissible under §10350.3 of the California Insurance Code were voluntarily excluded by the Appellee from its policies. Certainly exceptions not provided for in the policy should not be created by the Courts, especially when the insurer chooses not to have those exceptions.

The Eighth Circuit agreed that under ordinary circumstances such incontestability clauses do bar the specified defenses citing *Great Southern Life Insurance Co. v. Russ*, 14 F.2d 27 (8th Cir. 1926) then created an exception in the Eighth Circuit where the conduct of the insured offends the lower court.

This newly created exception is clearly wrong and is diametrically opposed to the decision of the Seventh Circuit, supra.

This conflict alone justifies the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF CALIFORNIA'S HIGHEST STATE COURT ON GENERAL AND NON-FEDERAL MATTERS.

The California courts have strictly interpreted the provisions of incontestable clauses as well as what constitutes a contest. In *Meyer v. Johnson*, 7 CA2d 604, 46 P.2d 822 (1935) the California Supreme Court held that an otherwise valid defense is too late if commenced after the expiration of the contestable period. The Court in *Meyer* held that a contest meant a judicial contest to which the insurer and insured are parties and could be either a suit to cancel the policy or as a defense to an action on the policy.

In *Joseph McMachin v. Great American Reserve Insurance Company*, 99 Cal. Rptr. 227 (1971), the 4th District of California Court of Appeals held that where an allegedly disabling accident occurred within the two (2) year incontestability period, insurer was required to take insured as it found him and could not successfully urge that disability resulted from an undisclosed pre-existing disease, illness or injury not covered by the policy. The Court noted that the appellant insurance company made numerous references to injuries and illnesses which plaintiff suffered prior to applying for his insurance, none of which were divulged by the plaintiff in his application. The Court held that the insurer was precluded from raising such defenses by the incontestability clause of the policy. The Court stated that statements made by the insured in his

application shall be incontestable after the policy had been in force for a period of two (2) years. The Court found that since the insurance company did not challenge the applications within the two (2) year period, the defendant was barred from contesting any statements made in the application. The Appellant submits that there is no factual distinction between that case and the case at bar that would dictate a different interpretation of the incontestability clause or result.

Many other cases in California came to the same conclusion reached in *McMachin*. In *Mutual Life Insurance Company v. Margolis*, 11 CA2d 382, 53 P.2d 107 (1936) the California Court held that the incontestability clause of a disability insurance policy bars an action by the insurer to cancel the disability policy on grounds of fraud in the application, *Cohen v. Metropolitan Life Insurance Company*, 32 CA2d 337, 89 P.2d 732 (1939).

III.

THE DECISION BELOW IS OF IMMEDIATE IMPORTANCE FAR BEYOND THE PARTICULAR FACTS AND PARTIES INVOLVED.

The Eighth Circuit's opinion in this case reflects a total disregard for the strong public policy of the State of California that affords its citizens the right to rely on policies of insurance after the two or three year period has elapsed to make the policies incontestable. California has, pursuant to its public policy, enacted a requirement that the incontestability clause be included in all policies of disability insurance. The Eighth Circuit's decision means that if the policyholder becomes a resident of the Eighth Circuit—as opposed to anywhere else in America—the California Insurance Code and indeed the policy itself will be held for naught. Recognizing the mobility of American citizens, there will be countless problems as a result of the Eighth Circuit's decision. Insurance carriers will relish the idea of

policyholders moving to the Eighth Circuit since there the insurance company will be able to plead defenses unavailable had the policyholder remained a California citizen and likewise unavailable had the policyholder moved his residence anywhere else but the Eighth Circuit.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioner

June 25, 1982

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

No. 81-1276

John S. Ferguson, M.D.,	•
	•
Appellant,	•
	• Appeal from the United
v.	• States District Court for
	• the Eastern District of
Union Mutual Stock Life	• Arkansas.
Insurance Company of America,	•
	•
Appellee.	•

Submitted: November 10, 1981

Filed: March 29, 1982

Before HEANEY and McMILLIAN, CIRCUIT JUDGES, and BENSON,* Chief District Judge.

BENSON, Chief District Judge.

Dr. John S. Ferguson appeals a district court judgment [1] on a jury verdict in favor of Unionmutual Stock Life Insurance Company (Unionmutual). Plaintiff Dr. Ferguson brought this

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[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

*Paul Benson, Chief District Judge, District of North Dakota, sitting by designation.

diversity action against Unionmutual to recover benefits on three disability insurance policies. Dr. Ferguson basically argues that the district court erred in permitting Unionmutual to present a defense based on statements made by Dr. Ferguson in two applications for the three policies notwithstanding the inclusion of certain incontestability clauses in the policies. For the reasons stated below, we affirm.

FACTUAL BACKGROUND

In January 1975, Dr. Ferguson consulted an insurance agent in California, Larry Davis, and submitted an application for disability insurance to Unionmutual. On the application form, the applicant was required to list other insurance in force. Dr. Ferguson listed only three policies, all from Massachusetts Indemnity Co. The three policies provided for monthly disability benefits in the amounts of $200, $800, and $500. Upon reviewing the application, Unionmutual issued a policy granting Dr. Ferguson $2,000 per month disability benefits. In March 1975, Dr. Ferguson submitted through agent Davis another application to Unionmutual for additional disability insurance coverage. On the March application, Dr. Ferguson listed the January Unionmutual policy and the three Massachusetts Indemnity policies for insurance in force. Also under the March application it was agreed that Unionmutual's issuance of additional policies was conditioned upon Dr. Ferguson discontinuing $1,500 coverage from Massachusetts Indemnity before May 1, 1975. On the basis of the applications, Unionmutual issued two policies, one on March 7, 1975 providing $500 monthly disability benefits and another on April 3, 1975 providing an additional $1,000 monthly disability benefits. All three policies issued by Unionmutual contained the following incontestability clause:

> INCONTESTABLE. (a) After this policy has been in force for a period of two years during the lifetime of the Insured, it shall become incontestable as to the

> statements contained in the application; and (b) No claim for loss incurred or disability (as defined in this policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from the coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

In July 1976, Dr. Ferguson fell while exiting a commercial air carrier and suffered a back injury rendering him totally disabled. On the day following the accident, Dr. Ferguson contacted David Carver, the insurance broker who had sold him the Massachusetts Indemnity policies, and instructed Carver to submit disability claims under all the doctor's policies. A notice of claim was sent to Unionmutual, which prompted Unionmutual to send blank claim forms to Dr. Ferguson. Sometime later, Mr. Carver reviewed the Unionmutual policies and discovered that at the time Dr. Ferguson had executed the two applications for the Unionmutual policies, the doctor had disability policies in force which were not disclosed on the applications. Also, it was found that the Massachusetts Indemnity coverage which was to have been discontinued was still in effect. Carver informed Dr. Ferguson of the inconsistencies relative to the applications and discussed with him the existence of the incontestability clauses. Carver explained that the two-year incontestable period had not passed so that Unionmutual would be permitted to contest any claims by asserting a defense based on misrepresentations on the two application forms. Thereafter, Carver sent a letter to Dr. Ferguson stating that the claims on Unionmutual would not be made "for reasons we discussed." The blank claim forms were returned to Unionmutual accompanied by a letter stating "Thank you, but will not need to submit a claim. Please close file. J.S.F." It was later found that the letter was in the handwriting of Mr. Carver who testified he did not remember sending it, but in any event would not have sent such a letter except at the direction of Dr. Ferguson. After expiration of the two-year incontestability

period, in October 1977, Dr. Ferguson submitted a completed claim form to Unionmutual. The company denied liability; the doctor sued. [2]

The district court denied plaintiff's motion for a summary judgment [3] and allowed defendant to present a defense based on the statements made in the applications.

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[2] The action was originally filed in the Circuit Court of Pulaski County, Arkansas and removed to federal court.

[3] The opinion is published at 501 F. Supp. 247 (E.D. Ark. 1980).

After a jury trial, the court, based on the jury's answers to interrogatories, entered judgment for the defendant. [4] The judgment required that upon surrender of the policies to defendant, defendant was to pay plaintiff the sum of all premiums paid on the policies plus interest, $11,149.88.

APPLICABLE LAW

On appeal, plaintiff argues that incontestability clauses are valid provisions in an insurance policy and the insurer

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[4]The following interrogatories were submitted to the jury, all were answered in the affirmative:

> INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that John S. Ferguson, at the time of applying for the policies in question, failed to disclose to Unionmutual all of his disability insurance coverage then in force with other insurers?
>
> INTERROGATORY NO. 2: If you have answered Interrogatory No. 1 "Yes," then answer this interrogatory.
>
> Do you find from a preponderance of the evidence that Dr. Ferguson's failure to disclose to Unionmutual the existence of other disability insurance policies was a misrepresentation of a fact which was material to Unionmutual's acceptance of the policy applications?
>
> INTERROGATORY NO. 3: Do you find from a preponderance of the evidence that Unionmutual issued two policies of disability insurance on the condition that Dr. Ferguson would cancel three other such policies written by Massachusetts Indemnity Company?
>
> INTERROGATORY NO. 4: If you have answered Interrogatory No. 3 "Yes," then answer this interrogatory.
>
> Do you find from a preponderance of the evidence that Dr. Ferguson's failure to cancel the three Massachusetts Indemnity policies was a condition material to Unionmutual's acceptance of the two policy applications?

cannot ignore the plain language of its policies and raise defenses which are barred by such clauses. We agree; under ordinary circumstances such clauses do bar the specified defenses. *See Great Southern Life Insurance Co. v. Russ*, 14 F.2d 27 (8th Cir. 1926). However, in this case, the conduct of the insured in withdrawing the claim during the running of the two-year contestability period and advising the insurer no claim would be filed and then subsequently refiling the claim after the expiration of the period is not an ordinary circumstance.

In this case, the district court relying, *inter alia*, on the case of *Kreinowitz v. New York Life Ins. Co.*, 2 N.Y.S.2d 826 (Sup. Ct. 1938), stated:

> While we might have great hesitation in holding as a matter of law that plaintiff could not now assert his claim on these three policies because of the delay in filing the notice of claim and proof of loss, we do not hesitate to hold that the effect of this delay is to bar the use of the incontestable clause by plaintiff to avoid an attack by defendant on the policy applications. Any further prejudice to the insurer by the delay may be obviated by our holding that the plaintiff may not assert the incontestable clause to avoid defenses pled by the insurer, including fraud in the policy application. We leave this issue to a later resolution. Our holding relies to a considerable extent on the doctrine of estoppel. This doctrine prevents a party, who has failed to act, from claiming a right to the detriment of his adversary when the latter was entitled to rely upon his affirmative action and has acted or failed to act accordingly. It has been successfully invoked by an insurer in a fact situation similar to that appearing in the case at bar. *McLawhorn v. American Central Life Ins. Co.*, 208 N.C. 709, 182 S.E. 139 (1935).

Ferguson v. Unionmutual Stock Life Insurance Co. of America, 501 F.Supp. 247, 250-51 (E.D. Ark. 1980).

On the record before the court, we approve of the action of the district court in allowing the matter to go to the jury, and we affirm the judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1982, three copies of the Petition for Writ of Certiorari were mailed postage prepaid to Hon. Winslow Drummond, 2200 Worthen Bank Building, Little Rock, Arkansas 72201, Counsel for Respondent. I further certify that all parties required to be served have been served.

S/ JOHN TRENTON HARMON
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